IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-492

STATE OF OHIO,

Petitioner,

vs.

TERRY L. GALLAGHER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

The Petitioner, the State of Ohio, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered in the above-entitled case on June 26, 1974.

OPINIONS BELOW

The opinion of The Supreme Court of Ohio is reported at 38 Ohio St. 2d 291, 67 Ohio Ops. 2d 354 and is printed as Appendix A. The opinion of the Court of Appeals for Montgomery County, Ohio is reported at 36 Ohio App. 2d 29, 65 Ohio Ops. 2d 17, 301 N.E. 2d 888 and is printed as Appendix B.

JURISDICTION

The judgment of The Supreme Court of Ohio was entered on June 26, 1974. The Court denied a petition for Rehearing on July 31, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3) since a right has been especially set up and claimed under the Constitution of The United States.

QUESTIONS PRESENTED

1. Should the prophylatic rules of Miranda be extended to a parole officer (who is a Law Enforcement Officer only in the sense that he can arrest a parole violator) when he interviews the Defendant (his parolee) in jail (but not incommunicado and not in a police dominated atmosphere) so as to exclude the parole officer's testimony offered at a later trial as to the Defendant's confession to him if the parole officer did not recite to the Defendant the Miranda warnings on the ground that the situation was inherently compulsory and therefore there was a violation of the Fifth Amendment to The United States Constitution, even though there was no reason to believe that the confession was unreliable or

that the parole officer did anything oppressive or illegal?
2. Assuming arguendo that a parole officer (with the aforesaid limited arrest powers) is a Law Enforcement Officer within the purview of Miranda and that his interview in jail with his parolee is a psychologically similar situation to that comprehended by Miranda, is not a complete recitation to said parolee of the Miranda warnings coupled with his full understanding and waiver of same, given to him a short time before said interview by police officers, sufficient compliance with Miranda or must said warnings be repeated at each interview so as not to vitiate an otherwise perfectly reliable statement?

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision which the above entitled Petition involves is as follows:

Constitution of the United States, Amendment V:

> No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

Factual Statement

On May 27, 1972, a small food store in Dayton, Ohio (known as the 7-11) was robbed at gunpoint by two men. One of the men pointed the gun at Alex Dean, the

manager, and did all of the talking. The other man, the Respondent, just stood near the gun wielder, then left with him and they walked together along the front of the store, to the corner thereof; approximately 35 feet. The Respondent was wearing a blond wig and sun glasses.

On June 21, 1972, Respondent, a 24 year old man, was arrested by a Montgomery County Sheriff's deputy in connection with other robberies. He had been released on parole from an Ohio prison on February 22, 1972 and was still being supervised by the Ohio parole authorities.

On the morning of June 22, 1972, Detective Wright of the Montgomery County Sheriff's Office and Detective Walsh of the Dayton Police Department questioned Respondent. Previous to the questioning, Detective Walsh, using a printed form, recited the so-called Miranda warnings to the Respondent. Respondent signified his understanding and his waiver of the rights delineated thereby and formalized this act by signing the waiver form. (Tr. 102-105).[1]

On June 26, 1972, Bill Sykes, the Respondent's parole officer, went to the Montgomery County jail to talk to the Respondent and asked the Respondent if he would tell him why he was there, but Respondent said he didn't want to. (Tr. pp. 147-149, 151). Then, on July 3, 1972, on a return visit by Mr. Sykes, the Respondent, without prompting, told Mr. Sykes the full details concerning the armed robbery of the 7-11 and his part therein including the facts that he was carrying a gun and wearing a wig and sunglasses. (Tr. pp. 152-155). No use was made by Mr. Sykes of any of the so-called Miranda warnings.

1. Tr. refers to the Reporter's Transcript of the proceedings in The Common Pleas Court of Montgomery County, Ohio. A certified copy of this transcript is filed with this Court.

At the Respondent's trial which commenced on November 2, 1972 to a judge (Respondent having waived a jury), Mr. Dean identified Respondent as one of the two robbers of The 7-11 Store and he and two customers described Respondent's actions in the store and described him perfectly.[2] The prosecution then offered Detective Wright's testimony, but the Court, after conducting a a voir dire examination with respect to compliance with the Miranda decision and voluntariness, rejected Detective Wright's and Detective Walsh's testimony as to any admissions of Respondent on the ground that they were involuntary. (Tr. 102-146). No mention was made of any irregularity in the waiver of the Fifth and Sixth Amendment rights by Respondent.

The testimony of Mr. Sykes, the parole officer, was offered and, over an objection that any communication between he and Respondent was *privileged* (Tr. 149-150), he related to the Court what the Respondent had told him about Respondent's involvement in the 7-11 robbery. (Tr. 153-156). Mr. Sykes said that he and Respondent just had an informal talk, that no force was used, and that their conversation certainly was not an interrogation. (Tr. p. 167). Mr. Sykes also said he had no arrest powers beyond that of arresting a parolee alleged to be in violation of the terms of his parole. (Tr. 165).

The respondent testified and admitted that he was not forced to talk to Mr. Sykes and that his statements to Mr. Sykes were made voluntarily. The only dispute was a factual one as to the contents of those statements. (Tr. 207 and 208).

The Court's verdict on November 14, 1972 was that

2. (Mr. Dean's identification had survived a pre-trial motion for suppression on due process grounds.)

Respondent was guilty of Armed Robbery and, on November 30, 1972, after a pre-sentence investigation, Respondent was sentenced to 10 to 25 years in the Ohio State Penitentiary.

HOW THE FEDERAL QUESTION AROSE

Respondent's objection to the testimony of Mr. Sykes was not based on the holding in *Miranda v. Arizona,* 384 U.S. 436 (1966) (Tr. 149-150), but he touched upon that case in his argument addressed to his oral motion for a dismissal at the conclusion of the State's case in chief while still disavowing his reliance thereon. (Tr. 194-196). However, the decision was appealed as of right to the Ohio Second District Court of Appeals where, in his First Assignment of Error, Respondent relied solely upon the holding in *Miranda v. Arizona,* supra and the case of *Mathis v. United States,* 391 U.S. 1 (1967). The Court of Appeals affirmed (Appendix B). Whereupon, the Respondent moved The Supreme Court of Ohio for leave to appeal the decision of the Court of Appeals which was granted. In his brief on said Motion for Leave and in his brief on the Merits in The Ohio Supreme Court, the Respondent assigned only one error, ie the admission of the parole officer's testimony in violation of the principles of *Miranda v. Arizona,* supra. The Supreme Court of Ohio reversed the Court of Appeals on June 26, 1974 (Appendix A) on the ground that there was error of a constitutional dimension in the admission of said testimony of the parole officer in that Respondent was compelled to be a witness against himself in violation of the Fifth Amendment to the United States Constitution unless the warnings set forth in *Miranda v. Arizona,* supra were recited to him.

REASONS FOR GRANTING THE WRIT

I.

The Important Question of Whether the Constitutional Exclusionary Rule Enunciated in *Weeks v. United States* and *Miranda v. Arizona* Applies to Interviews Between Parole [Probation] Officers and Their Clients Where There Is Absolutely No Evidence of Compulsion—a Question On Which There Has Been Conflict in State and Federal Decisions—Is Squarely Presented Here and Should Be Decided By This Court.

The petitioner contends that the Ohio Supreme Court has misinterpreted the holding of this Honorable Court in *Miranda v. Arizona,* 384 U. S. 436, 16 L.Ed. 2d 694, 86 S. Ct. 1602 and especially as that decision has been recently reinterpreted in *Michigan v. Tucker,* __U.S.__, 94 S. Ct. 2357. Furthermore there is direct conflict on this important question as to whether to apply Miranda to these types of situations between the various state courts and between some state courts and the Federal courts. In this case a State parole officer was involved. In others, it was a probation officer; but the principle is the same.

Three states have previously held that a parole officer is bound by Miranda: *State v. Lekas,* 201 Kan. 579, 442 P. (2d) 11 (1968); *State v. Williams,* 486 S. W. (2d) 468 (Missouri Sup. Ct. 1972); and *People v. Gastelum,* 237 Cal. App. (2d) 205, 46 Cal. Rptr. 743 (1965). Now, with this case, there are four. However, the facts of those three cases are not even remotely similar to those in this case inasmuch as the parole officer interrogated the defendant in them just like a policeman. These courts have been joined by the Fifth Circuit United States Court of Appeals in *United States v. Deaton,* 468 F.2d

541 (1972) (cited at length by The Ohio Supreme Court in their opinion in this case).

However, five states have held differently: *Cunningham v. Texas,* 488 S.W. (2d) 117 (1972) (Texas Court of Criminal Appeals); *State v. Johnson,* 202 N.W. (2d) 132 (1972) (So. Dakota Sup. Ct.); *People v. Ronald W.,* 24 N.Y. (2d) 732, 302 N.Y.S. (2d) 260, 262 (1969) (Court of Appeals); *Gilmore v. People,* 171 Colo. 358, 467 P. (2d) 828 (1970) (Colorado S. Ct.); and *Nettles v. State,* 248 So. (2d) 259 (Florida Dist. Ct. of Appeals, 1971).

Thus, there are conflicting opinions on this federal issue from State Appellate Courts and United States Courts of Appeal and this issue will continue to be resolved in differing manners in State Supreme Courts, Federal Trial Courts, and Federal Appellate Courts until this Honorable Court offers a definitive opinion as to the admissibility of such a witness' testimony under the same or similar circumstances.

In addition to the conflict, it is respectfully submitted that The Ohio Supreme Court was wrong when it held that the decision of this Honorable Court in Miranda was applicable to the facts in this case so as to require the exclusion of the testimony of the parole officer because he compelled the Respondent to confess in violation of Respondent's Fifth Amendment rights. This is an unwarranted extension of this Honorable Court's holding in Miranda as explained in *Michigan v. Tucker,* supra.

Miranda, by its very language, was confined in its application to situations where there was incommunicado interrogation in a police dominated atmosphere. This has recently been reiterated in Tucker. Additionally, the prophylactic rules of Miranda were aimed only at the police and, since otherwise reliable evidence of guilt was

to be excluded by failure to follow them, were stated explicitly in Tucker to be applicable to two situations only: 1) to deter the police, and 2) to insure reliability. As to these, the Court in Tucker said: "Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." and "Cases which involve the Self-Incrimination Clause, must, by definition, involve an element of coercion, since the clause provides only that a person shall not be compelled (emphasis added) to give evidence against himself." It is submitted that neither factor is at all likely to be involved where parole or probation officers are concerned and, since there is not a trace of force in this case, the Ohio Supreme Court erred in applying the coercion clause of the Fifth Amendment to the facts herein. After all, is it possible to pull yourself up by your own bootstraps by denying that a privileged communication exists while asserting that one does exist privately so as to indirectly find coercion where none in fact exists? Thus, the Ohio Supreme Court erred in finding, as a matter of law, that the Respondent was compelled to be a witness against himself when neither he nor his parole officer believed that he was under any pressure from a compelling atmosphere or for any other reason[3] and this case presents a substantial and important question as to the meaning of Compulsion under the Fifth Amendment, which question should be resolved by this Court.

The extreme importance of this question to the people of Ohio and of the other States can not be underestimated and is illustrated by the fact that, in reliance upon the wording and rationale of this Honorable Court

3. Respondent testified that his statement to Sykes was completely voluntary (Tr. 207 and 208).

in Miranda, supra, the trial court allowed the police officer to testify. Other trial court's (and especially since the decision in Tucker, supra) will most probably do the same and possibly be reversed as in this case, thus possibly freeing other individuals extremely dangerous to the public safety as will most probably happen here if this decision is permitted to stand. Furthermore, will the Ohio Court and other Courts extend their conception of compulsion to the parole or probation officer's testimony at revocation hearings? Ohio has already, in this case, extended Miranda to the parole officer's office. Does that require a lawyer at every interview? What will that do to their relationship?

Relevant and material evidence should be rejected only if it is demonstrably unreliable. The rejection by a State Court of such evidence [formerly admissible] on the ground that it was obtained by a violation of the Defendant's Constitutional Rights under the Constitution Of The United States gives rise to an issue which should be resolved by this Court.

II.

The Additional Important Question Of Whether The Warning Required by Miranda Must Be Repeated at Each Interview Once They have Been Given And The Rights Effectively Waived Is Also Squarely Presented Here and Should Be Decided By This Court.

In the case of *Maguire v. United States*, 396 F.2d 327 (1968), the Ninth Circuit United States Court of Appeals found that an adequate rendition of the Miranda warnings to a defendant was sufficient and that they did not have to be repeated three days later. Now the Ohio Supreme Court in this case has decided that this is not the law and that the warnings must be repeated

and (by extension) the waiver, also[4]. A direct conflict on an important federal question between a federal court and the highest court of a state thus exists and should be resolved by this Honorable Court.

This situation, of course, comes up again and again at the trial level and, in the writers' experience has been resolved both ways by the trial courts; but mostly by following Maguire, supra.

Applying the reasons given in Miranda for requiring the warnings to these situations involving parole and probation officers, both here and in other cases, can it be said that there is such a need to control said officers and such a likelihood that unreliable evidence will be forthcoming without the warnings; especially when parolees and probationers are usually experienced law breakers well aware of their rights? Thus, to require repeated warnings for such as defendant and to exclude reliable evidence when they are not given flies in the face of reason and of the intendment of Miranda.

Thus, because there is a conflict, as stated hereinabove, because this is an important federal question not heretofore decided by this Honorable Court, and because the Ohio Supreme Court has decided this question contrary to the interpretations given to the compulsory self-incrimination clause of the Fifth Amendment to the United States Constitution heretofore rendered by this Honorable Court in Miranda and Tucker, supra, this is a question which should be resolved by this Court for clarification and direction to the various State Courts and lower Federal Courts.

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4. See Appendix A, pages 15 f.n. 2 & 19 f.n. 6.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LEE C. FALKE,
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Montgomery County, Ohio

HERBERT M. JACOBSON,
Chief Trial Counsel

RANDAL A. ANDERSON, JR.,
Assistant Prosecuting Attorney

APPENDIX A

THE STATE OF OHIO,
Appellee,

v.

GALLAGHER,
Appellant.

[Cite as State v. Gallagher (1974), 38 Ohio St. 2d 291.]

Criminal law — Evidence — Statements by accused to parole officer—Inadmissible, when—Statements made in response to questioning — Miranda warnings not given prior to questioning.

Testimony as to utterances made by an accused to his parole officer is inadmissible at trial where the utterances were in response to questions by the parole officer, and, prior to the questioning, the parole officer failed to advise the accused of his right to remain silent, of his right to be provided with counsel prior to questioning, and warn him that any utterance may be used as evidence against him.

(No. 73-623—Decided June 26, 1974.)

APPEAL from the Court of Appeals for Montgomery County.

On May 27, 1972, an armed robbery occurred at a 7-11 store, located in Dayton, Ohio.

Terry L. Gallagher, appellant herein, was charged with the robbery, and waived his right to a jury trial.

The store's cashier described the robbery as follows: A tall man (not the defendant) approached the check-out counter, ordered a pack of cigarettes, requested change for a ten dollar bill, and then brandished a pistol and instructed the cashier to put all the money into a paper sack. At the time, there were some children in the store at a candy rack, a repairman working on an ice machine, who apparently never noticed that a robbery was taking place, and a man later identified as Gallagher.

Gallagher stood an arm's length from the gunman; but "never said a word to" the cashier, never exhibited a gun, never said a word to or made gestures at the gunman, nor manifested in any way his participation in the crime. However, when the gunman left the store with the money, Gallagher, and the gunman walked out of the store and out of view "side by side."[1]

The record shows further that two women entered the store at the time the cashier was filling the bag with money. At trial, the women corroborated the cashier's account of the robbery, from the time they entered the store until Gallagher and the gunman left the store.

The women were unable to identify Gallagher, but the cashier had previously identified Gallagher and the gunman from police photographs, and made a positive identification of Gallagher at trial.

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1. At a pre-trial hearing, upon a motion to suppress certain evidence, the cashier testified that he had *assumed* the complicity of Gallagher and the gunman because the two men had stood close together in the store and left the store together. However, this testimony was not elicited at trial.

The court granted a hearing on a motion by the defense to determine the admissibility of utterances made by Gallagher to police officers in the following situation: A day after his arrest, Gallagher was taken to a police interview room where he signed a "rights waiver."[2] In the room with him were Detective Wright, from the sheriff's office; Detective Walsh, from the Dayton Police Department; and Jerry Helson, an adult parole officer.

Wright testified to the following: That a Richard Sorrell, who had already made a "statement where he admitted his implication" in the armed robbery of the 7-11 store, was brought into the interview room, at Helson's suggestion, "to either refute or corroborate what was said at that point [by Gallagher];" that Gallagher was told that Sorrell had given a statement to the police, and that if both Sorrell and Gallagher "copped out" on one robbery charge then other robbery charges would be dropped; that Sorrell and Gallagher were allowed to talk privately for a half hour; that Helson and Gallagher then talked privately for a half hour; and that Wright advised Gallagher that he would not be charged with other robberies if he "copped out" on this one.

Walsh testified to the following: That during the interview, Walsh "informed Mr. Gallagher that Sorrell had implicated him [Gallagher] on some of the robberies Sorrell was charged with * * * this one included," and that Gallagher then "indicated a willingness to tell us [the police] about this particular robbery with no other

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2. The sufficiency of any *Miranda* warnings that were given is not challenged in this appeal.

charges and I [Walsh] guaranteed him I would not file any additional charges."

The court granted the motion to suppress, reasoning that "this defendant when giving this statement did act or operate under promises of leniency, and, therefore, the court feels that such action, which we feel could have been avoided by the officers in question, constitutes an involuntary statement and the court, therefore, will decline to receive it."

The next witness for the state was Bill Sykes, who identified himself as Gallagher's parole officer. A motion to suppress this testimony was overruled, and Sykes testified that he visited Gallagher in jail four days after Gallagher's interview with the police officers. At no time did Sykes advise Gallagher of his right to remain silent; that any utterances to Sykes would be used as evidence in court; or of any other *Miranda*[3] right. However, during this visit, Sykes asked Gallagher to relate "the circumstances surrounding the arrest." Gallagher's response to Sykes was that "he didn't want to make any statement in regard to the circumstances surrounding the arrest."

Sykes left, but returned seven days later to Gallagher's cell.

To justify his visits to Gallagher's cell, Sykes explained that it was part of his job to try to get some type of statement from a parolee under his charge who was a criminal suspect.

During the second visit, Sykes renewed his request for information from Gallagher, and Gallagher complied by admitting that he had participated in the robbery.

3. *Miranda* v. *Arizona* (1966), 384 U.S. 436, is referred to herein as *Miranda*.

Counsel for appellant objected to the admissibility of Sykes' testimony, and moved that it be stricken. The motion was overruled.

The court entered judgment on its verdict that appellant was guilty of armed robbery.

Upon appeal, the Court of Appeals, in a reported opinion (*State* v. *Gallagher* [1973], 36 Ohio App. 2d 29), affirmed the judgment of the Court of Common Pleas.

The cause is now before this court pursuant to the allowance of a motion for leave to appeal.

Mr. Lee C. Falke, prosecuting attorney, and *Mr. Randal A. Anderson, Jr.*, for appellee.

Mr. Jack T. Schwarz, for appellant.

WILLIAM B. BROWN, J. The question presented is whether testimony, concerning certain statements made by appellant to his parole officer about his involvement in a crime, was received at trial in violation of appellant's privilege against self-incrimination, as guaranteed by Section 10, Article I of the Ohio Constitution, and the Fifth Amendment to the United States Constitution.

The opinion of the Court of Appeals and the brief of appellee cite cases from other jurisdictions which have considered this question. Of the cases cited, three courts held the testimony of the parole officer inadmissible because the accused had not been given *Miranda* warnings at any time prior to questioning by the parole officer[4]; two courts held the testimony proper because a parole or probation officer is not a "law enforcement officer" as contemplated by *Miranda* and, therefore, the accused was not entitled to *Miranda* warnings[5]; in *Nettles* v. *State*

4. *State* v. *Lekas* (1968), 201 Kan. 579, 442 P. 2d 11; *State* v. *Williams* (Mo. 1972), 486 S. W. 2d 468; and *People* v. *Gastelum* (1965), 237 Cal. App. 2d 205, 46 Cal. Rptr. 743.

5. *State* v. *Johnson* (S. Dak. 1972), 202 N. W. 2d 132; *People* v. *Ronald W.* (1969), 24 N. Y. 2d 732, 249 N. E. 2d 882.

(Fla. App. 1971), 248 So. 2d 259, the court held a probation officer's testimony admissible, even though the officer had failed to advise the accused of his rights, because the accused, by accepting probation, had supposedly effectuated a continuous waiver of the right to be advised of his *Miranda* rights; and in the last case cited, *Gilmore* v. *People* (1970), 171 Colo. 358, 467 P. 2d 828, the court held a probation officer's testimony admissible because the statements made to the officer had been "volunteered" within the meaning of *Miranda*, wherein (384 U. S. 436), at page 478, the United States Supreme Court stated: "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today."

In our opinion, the foregoing cases are not persuasive when applied to the facts in this case, which may be briefly summarized as follows: Police officers advised appellant of his *Miranda* rights prior to interrogation, and when the appellant refused to make a statement he was offered promises of leniency and was confronted by an alleged accomplice who had already confessed to the crime. As a result of those tactics, appellant made a statement to the police officers which was later suppressed at trial as an *involuntary* utterance. Four days after appellant's interrogation, his parole officer asked for a statement, but appellant refused to discuss the matter. The parole officer never advised appellant of any of his *Miranda* rights, but nevertheless returned seven days later, requested a statement, and got one. At trial, the parole officer was called as a prosecution witness and related the statements made to him by appellant.

Upon those facts, we view the question presented in this appeal as whether appellant was compelled to pro-

duce evidence against himself or whether utterances to his parole officer were voluntarily given. Upon this ultimate issue of voluntariness, it is our duty to "make an independent determination." *Davis* v. *North Carolina* (1966), 384 U. S. 737, 742.

United States v. *Deaton* (C. A. 5, 1972), 468 F. 2d 541, certiorari denied, 410 U. S. 934, squarely confronts the precise question presented by this case, at page 544:

"• • • Deaton's parole officer testified, over objection, to statements made to him by Deaton, tending to incriminate Deaton on the harboring and concealing charge, uttered in response to direct interrogation by the parole officer when Deaton was in custody, and without the officer having given Deaton the warnings required by *Miranda*. We have considerable doubt as to the propriety of even calling the parole officer as a witness for such a purpose.[6] But, pretermitting that, we have no doubt that

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6. The lack of propriety referred to by the *Deaton* court is more fully illustrated in *Smith* v. *Rhay* (C. A. 9, 1969), 419 F. 2d 160, 164, as follows:

"• • • Although Northrup [the parole officer] was called as a witness for the purpose of describing the investigation and arrest, his testimony revealed through necessary inference that he was already acting in the capacity of Smith's parole officer at the time of the offense. The jury obviously must have inferred that Smith had been previously convicted for unknown crimes, an inference that would place Smith's character in issue as part of the prosecution's case against him. Smith contends that this procedure violated his constitutional right to a fair trial.

"It is a rule of almost universal application that evidence of past crimes cannot be introduced as part of the prosecution's case in chief. The rule is based on both a lack of relevance to the principal case and the highly prejudicial effect that the evidence may have on a jury. • • •"

However, in this case, there was no objection made to the identification of Sykes as appellant's parole officer, and that question is not before this court.

the testimony was inadmissable unless the officer gave prior *Miranda* warnings. A parolee is under heavy psychological pressure to answer inquiries made by his parole officer, perhaps even greater than when the interrogation is by an enforcement officer." [7]

We agree that a parolee is under heavy pressure to cooperate with his parole officer. Here, the parole officer testified that he had the power to recommend the return to prison of a parolee under his charge, and that appellant might have assumed that his utterances were in some way confidential.

It is clear, therefore, that compulsion intervened when the parole officer sought to elicit a statement from appellant, without first making known to appellant that the privilege against self-incrimination could be relied upon.

Accordingly, we hold that testimony as to utterances made by an accused to his parole officer is inadmissible at trial where the utterances were in response to questions by the parole officer and, prior to the questioning, the parole officer failed to advise the accused of his right to remain silent, his right to be provided with counsel prior to questioning, and to warn him that any utterance may be used as evidence against him.

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7. The *Deaton* court went on to affirm the conviction, because on the day preceding the statement to the parole officer, Deaton had made verbal statements to police officers "after having been given proper *Miranda* warnings," and subsequent to the statement to the parole officer, Deaton reduced the prior verbal statement to police officers into a formal recorded statement. Thus, the court concludes, "the statements to the parole officer were merely cumulative of evidence from other sources." In this case, however, prior statements to police officers were properly suppressed at trial as involuntary utterances.

Therefore, the judgment of the Court of Appeals is reversed, and the cause is remanded to the Court of Common Pleas for further proceedings in accordance with law.

Judgment reversed.

O'NEILL, C. J., HERBERT, STERN, CELEBREZZE and P. BROWN, JJ., concur.

CORRIGAN, J., dissents.

APPENDIX B

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO,
Plaintiff-Appellee,

vs.

TERRY L. GALLAGHER,
Defendant-Appellant.

Case No. 4158

OPINION

Rendered on the 30th day of May, 1973.

* * *

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Attorneys for Plaintiff-Appellee.

JACK T. SCHWARZ, 604 American Building, Dayton, Ohio 45402,
Attorney for Defendant-Appellant.

* * *

SHERER, J.

Defendant-Appellant is appealing from a conviction of guilty of armed robbery of a Xenia Avenue 7-11 Store on or about May 27, 1972. He was tried without a jury

and sentenced for from ten to twenty-five years in the Ohio State Penitentiary.

Appellant claims as assignments of error the refusal of the trial judge to suppress the statements Appellant made to his parole officer, William Sykes, and the judge's failure to direct a verdict in favor of Appellant at the end of the State's case.

The Record shows that on or about the afternoon of May 27, 1972, Alex Dean, an employee of the 7-11 Store, was robbed at gunpoint of approximately $350.00 by two young men. He testified that while the two men stood within arm's length of each other, only one of the two, not Defendant-Appellant, held the gun, did all the talking, and received the money. The two men then left the store together.

Although there were two female adults in the store at the time who corroborated Mr. Dean's account of the robbery, only Mr. Dean was able to later identify Appellant as one of the robbers, which he did from a group of photographs shown to him by the Dayton police.

At the trial of this cause, William Sykes, a parole officer assigned to Appellant when he was released from prison on a previous conviction, was permitted to testify, over objection, that he conversed with Appellant on two separate occasions while Appellant was incarcerated after arrest on the present charge. The first conversation occurred on June 26, 1972, at which time Appellant told Mr. Sykes he did not wish to discuss the incident. Mr. Sykes testified that at the second meeting, on July 3, 1972, Appellant admitted to him that he went to the 7-11 Store on the day in question with the man who robbed the store, that he had a weapon, that he was prepared to use it, and that he and the robber acted in concert (T-154). Mr. Sykes further testified that he at no time

advised Appellant of his rights to remain silent, to have an attorney present, and that anything he said could be used against him.

It is the Trial Court's admission of Mr. Sykes' testimony, which Appellant avers is in violation of the constitutional requirements of *Miranda vs. Arizona, 384 U. S. 436,* that Appellant raises as his first assignment of error.

The issue of whether a parole or probation officer is a "law enforcement officer" within the contemplation of *Miranda* and thus subject to the *Miranda* requirements of constitutional warnings to suspects during custodial interrogation has not yet been decided in Ohio. But a review of decisions in other jurisdictions reveals that decisions have gone both ways.

In *State vs. Lekas, 201 Kan. 579, 442 P. (2d) 11 (1968),* the Supreme Court of Kansas held that officers of the Kansas State Board of Probation and Parole are required to comply with the mandates of *Miranda* if while investigating a fresh felony by a parolee they elicit incriminating statements later admitted into evidence in the prosecution of that new offense. In *Lekas* and two cases which concur with it, *State vs. Williams, 486 S.W. (2d) 468 (Missouri Sup. Ct. 1972),* and *People vs. Gastelum, 237 Cal. App. (2d) 205, 46 Cal. Rptr. 743 (1965),* the defendant had not been given the full *Miranda* warnings at any time previous to the questioning by the parole officer.

In *State vs. Johnson, 202 N. W. (2d), 132 (1972),* the South Dakota Supreme Court held differently by distinguishing a parole or probation officer from the "law enforcement officer" envisioned in *Miranda,* stating at page 133-134:

> "It is the duty of a law enforcement officer to detect crime and enforce the criminal laws of the state. The duty of the probation officer is the antithesis of this. His duty begins when the peace officer's duty ends. He does not have a peace officer's broad power of arrest. He has only the limited authority to take and detain a probationer when the terms of the suspension or probation have not been observed or when it is necessary to prevent escape or enforce discipline. Otherwise he has supervisory powers only to help in the reformation and rehabilitation of convicted persons on probation, parole, or suspended sentences."

In *People vs. Ronald W., 24 N. Y. (2d) 732, 302 N. Y. S. (2d) 260, 262 (1969),* the Court of Appeals of New York remarked:

> "The clearly stated objectives of education and rehabilitation which are always paramount in the relationship between the probation officer and the probationer are totally foreign to the elements the Supreme Court addressed itself to in *Miranda.*
>
> . . . . . .
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> "It is true that a probation officer is a 'peace officer' but, certainly, he is not a 'law enforcement' officer within the spirit or meaning of *Miranda v. Arizona.*"

Gilmore vs. People, 171 Colo. 358, 467 P. (2d) 828 (1970), involved statements made by a defendant to his federal probation officer. The defendant had been given the *Miranda* warnings by the police and he denied everything they charged him with. He then admitted the offense to the probation officer. The Trial Court held that the defendant was adequately warned of his *Miranda* rights by the police and that any statements he made subsequently to anyone else were made voluntarily.

In *Nettles vs. State, 248 So. (2d) 259* (Florida Dist. Ct. of Appeals, 1971), the Court held admissible a defendant's admission to his probation officer who failed to give him the *Miranda* warnings. As in the case now

before us, the defendant had signed a waiver of his *Miranda* rights six days before he made the statement to the probation officer. The Florida court analogized probation to being in constructive custody whereby the probationer agreed to abide by certain rules and restrictions as conditions for probation. The Court went on to state that the probationer waived his constitutional *Miranda* rights when he accepted probation and this waiver continued in effect even on a new and fresh crime insofar as the probation officer is concerned:

> "We do not hold that he had waived his *Miranda* rights in all circumstances but as to his probation officer the waiver was in continuing effect during the term of his probation and he was not entitled to *Miranda* warnings.
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> . . . . . .
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> ". . . if upon every visit or contact with the probation officer the probationer is entitled to a warning then the relationship between the probation officer and the probationer would be a strained one indeed and the purpose of probation would be materially affected.". *248 So. (2d), at 260.*

We feel compelled, by the facts of the instant case, to follow the majority decisions in other jurisdictions and agree with the Trial Court that the statements Mr. Gallagher made to his parole officer are admissible in evidence against him. The record shows that Appellant was fully advised of his *Miranda* rights by the Dayton Police on June 22, 1972, shortly after his arrest, and he signed the standard pre-interview form that lists all the rights, thereby agreeing that any statements he made thereafter were of his own free will. The law is established that there is no requirement to repeat these warnings during subsequent questioning, even if several weeks elapse and further questioning is conducted by other persons. *Gor-*

man vs. U.S., 380 F. (2d) 158, 164 (1st. Cir. 1967); Maguire vs. U.S., 396 F. (2d) 327, cert. denied, 393 U.S. 1099 (1968).

Mr. Sykes testified that he visited Appellant initially on June 26, 1972:

> "It's part of my job when one of my fellows gets arrested, I'm to interview him and see what his circumstances are." T-148

At that time, Appellant said that he did not wish to make any statement in regard to the circumstances surrounding the arrest (T-151). Mr. Sykes returned to Appellant on July 3, 1972, again at his own discretion, as "part of my job" and elicited the admissions concerning the armed robbery in question (T-151).

This Court is of the opinion that Mr. Sykes on both visits was merely carrying out his duty as a parole officer to investigate any violations of the law committed by his parolee. This is not done solely to elicit confessions that can later be used against the parolee at trial, but merely to aid in the rehabilitation of the parolee. There is no indication in the record that Mr. Sykes acted jointly with the police, at their instigation, or as an agent or tool of the police. Nor does the testimony of Appellant at trial indicate otherwise. Appellant stated that he was not forced to talk with Mr. Sykes in the jail, that he knew he did not have to talk with him, that everything he said was said voluntarily (T-206-07).

Appellant also contends that the relationship of parole officer and parolee is a privileged one, that all communications between the two are thereby confidential, and that to hold otherwise would undermine the rehabilitation process envisioned by the parole system. While we agree that a beneficial relationship between the parole officer and his charge depends upon mutual trust and

confidence, we are unable to agree that communications between the two fall within the class of inadmissible privileged communications such as those of attorney-client, husband-wife, physician-patient, or priest-penitent. A parolee is advised of the restrictions and conditions of his parole, that he can lose his parole status if he violates those precepts, and that his parole officer has the power to arrest him for transgressions. Under these circumstances then, we cannot hold that Appellant's admissions to Mr. Sykes were privileged, regardless of what Appellant may have thought at the time.

Appellant's first assignment of error will therefore be overruled.

Appellant contends as his second assignment that the Trial Court erred to his prejudice in overruling his motion to dismiss the action at the close of the prosecution's case. He claims that his statements to Mr. Sykes were inadmissible and that without those statements, there was insufficient evidence with which to convict him. Since this supposed error relies on the exclusion of Appellant's statements as to the crime in question, and having already ruled that said statements are admissible, we must overrule Appellant's second assignment of error. It is clear from a review of the record as a whole that there was ample evidence to sustain the Court's verdict of guilty.

Having found no error in the record prejudicial to Appellant, the judgment of the Common Pleas Court will be affirmed.

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CRAWFORD, P. J., and KERNS, J., concur.